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SUPREME COURT, U.S.

No. 129.

In the Supreme Court of the United States

October Term, 1948.

WILLIAM T. URIE, *Petitioner*,

vs.

GUY A. THOMPSON, Trustee of the Missouri Pacific Railroad Company, a Corporation, *Respondent*.

RESPONDENT'S BRIEF.

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In the Supreme Court of the United States

October Term, 1948.

No. 129.

WILLIAM T. URIE, *Petitioner*,

vs.

GUY A. THOMPSON, Trustee of the Missouri Pacific Railroad Company, a Corporation, *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

STATEMENT.

The Supreme Court of Missouri, *en banc*, reversed a judgment for petitioner (R. 34) and adopted the divisional opinion (R. 20, et seq.) (*Urie* v. *Guy A. Thompson*, Tr., 240 S. W. (2d) 98). The action was under the Federal Employers' Liability Act, 45 U. S. C., Sec. 51, et seq., charging violations of the Boiler Inspection Act, 45 U. S. C., Sec. 23, et seq. (R. 20).

The fourth amended petition on which the cause was tried alleged that for about 30 years prior to May, 1940,

petitioner was employed by respondent railroad as a fireman in interstate commerce and that during all of said time respondent allowed dusts and sand in harmful quantities to enter the cabs and decks of locomotives where petitioner worked, resulting in petitioner becoming disabled on and after May, 1940, from silicosis. After quoting Sec. 2 of the Boiler Inspection Act (45 U. S. C., Sec. 23), the petitioner alleged that his injuries and conditions were caused by respondent's violation of said Act in that: (1) Dusts and sands entered said locomotive in harmful quantities, (2) Sanders would let out sand when set in operation and when defective or not properly adjusted, (3) Decks and connections permitted dusts and sand to enter cabs, (4) Respondent failed to maintain said cabs and decks in safe condition (R. 1-4).

Respondent entered a general denial and further alleged that the locomotives were regularly inspected by inspectors of the Interstate Commerce Commission and that all regulations of the Commission had been complied with, averred silicosis is not within the purview of the Boiler Inspection Act, and further interposed the plea of limitation of action (45 U. S. C., Sec. 56) (R. 4-8).

The evidence was not included in the record but the opinion of the Missouri Supreme Court reflects that petitioner commenced work for the respondent railroad in 1908 and left in May, 1940, being principally employed as a fireman on engines from Joplin to Kansas City, Missouri (R. 22). The sand used was tailings from the lead and zinc mines of Webb City and Carterville, Jasper County, Missouri (R. 22). When the sanders on a locomotive were used or when they leaked sand onto the rails under the drivers, the speed would suck it up into the cab after it was ground under the wheels. The dust would be sucked up through any openings in the deck of the cab (R. 24). The opinion discloses no evidence that other rail-

road companies used different or less harmful sand, took measures to make the decks of cabs airtight against dust or sand; or installed in their cabs fans, masks or respirators to avoid dust being breathed by enginemen. In fact, it appears from the record and a search of authorities that this is the first reported case of a fireman or engineer seeking recovery for silicosis.

The cause was submitted to the jury under instructions which told them that they were not to give any consideration to whether respondent was negligent or not negligent because the case was based on the Boiler Inspection Act and by reason thereof negligence was not involved and wholly immaterial (R. 10, Instruction No. 3). The jury, so instructed, returned a verdict for petitioner in the sum of $30,000.00 and judgment was entered thereon (R. 14).

The Missouri Supreme Court reversed, holding that the Boiler Inspection Act is aimed at promoting safety from accidental injury, as distinguished from injury due to the gradual inhalation of harmful dusts and, since petitioner's condition was not one the act was designed to guard against, he could not recover (R. 30).

Petitioner seeks a review of that decision and also of the opinion of the Missouri Supreme Court on prior appeal, holding that petitioner could not recover under the Federal Employers' Liability Act upon the facts alleged (*Urie* v. *Thompson*, Tr., 352 Mo. 211, 176 S. W. (2d) 471). Although the reported opinion on first appeal is cited in the record, neither the judgment or opinion in this appeal are included in the transcript of record.

A reference to the reported opinion indicates that the Missouri Supreme Court there held that the petition alleged that the sanders were of the usual and customary type and were not defective, but the trouble was maladjustment; that respondent was not to be held to a higher degree of care than the average in the railroad

business; and that it would not be reasonable to hold, under the facts admitted by demurrer, that respondent should have anticipated petitioner's injury; the Missouri Supreme Court ruling that the petition did not state facts sufficient to constitute a cause of action for negligence under the Federal Employers' Liability Act.

The action was first instituted November 25, 1941, and on this first appeal, the Missouri Supreme Court refused to rule that injuries from inhalations of dust prior to November 25, 1938, were barred under 45 U. S. C., Sec. 56. Respondent contends that this holding was not in accord with the applicable decisions of this Court.

Respondent further contends that the judgment in the first appeal cannot now be reviewed, but in any event that, except as to limitations, both appeals were decided correctly and in accord with the applicable decisions of this Court.

ARGUMENT.

Summary of Argument.

I. The Boiler Inspection Act is aimed at promoting safety from accidental injury, as distinguished from injury due to the gradual inhalation of harmful dusts, silicosis or occupational disease; and petitioner cannot recover for a violation thereof since his condition was not one the statute was designed to prevent.

II. The Boiler Inspection Act furnishes no intelligible standard of conduct as to the prevention of occupational disease or the inhalation of harmful dusts.

III. Proof of negligence is essential to a recovery under the Federal Employers' Liability Act for injury resulting in negligence in cars, engines and appliances and the Boiler Inspection Act cannot be invoked to dispense with proof of negligence unless the injury was one that the Act was designed to prevent.

IV. Negligence is essential to any recovery at common law for occupational disease and to any recovery under the Federal Employers' Liability Act and the unbending test of negligence as to methods, machinery and appliances is the ordinary usage of the business. Respondent cannot be held to have anticipated the novel possibility of petitioner contracting silicosis while working in the open cab of a moving engine.

V. The words "any person suffering injury" in the Federal Employers' Liability Act does not include occupational disease or, more specifically, injury due to the gradual inhalation of harmful dusts.

VI. Petitioner assumed the risk of silicosis from dust in engine cabs prior to the Amendment of August 11, 1939, to the Federal Employers' Liability Act (45 U. S. C., Sec. 54).

VII. Petitioner cannot maintain an action for injuries from dust inhaled before three years prior to instituting action on November 25, 1941 (45 U. S. C., Sec. 56).

VIII. Since the transcript of record does not contain the judgment or opinion of the Supreme Court of Missouri on first appeal, it cannot be affirmatively determined that a decision of a federal question was necessary to a determination of the cause or that the judgment was not final, so as to permit review on certiorari from the final judgment in the second appeal.

IX. Certiorari should be denied.

I.

The Boiler Inspection Act is aimed at promoting safety from accidental injury, as distinguished from injury due to the gradual inhalation of harmful dusts, silicosis or occupational disease; and petitioner cannot recover for a violation thereof since his condition was not one the statute was designed to prevent.

A.

Legislative History of Enactment.

The Boiler Inspection Act was enacted in 1911 primarily to prevent accidental injuries and death from boiler explosions. (Act of Feb. 17, 1911, Chap. 103, 36 Stat. 913-916—Appendix.) The discussion of the bill (S. 6702) in the House of Representatives is found in the Congressional Record, Vol. 46, Part 3, pages 2070-2074.

Some material portions of the record are quoted for convenience:

"Mr. Fitzgerald: It is believed the result of this legislation will be the lessening of railroad accidents?

Mr. Mann: It is the belief of all people concerned, both the railroads and the employees, that the passage of this bill will materially result in the lessening of boiler explosions. * * *

Mr. Martin of Colorado: Mr. Speaker, I merely wish to assure the members, as perhaps the only member of this House who is directly affiliated with the railway brotherhoods of the country, that this measure is agreed upon by and is satisfactory to them at this time and in its present form. * * * But they feel that this is the recognition and the establishment by Congress of a much-needed principle—to protect the lives and limbs of railway employees—and that is what they are chiefly concerned in with reference to the present measure. * * *

We require driver brakes to be placed upon locomotives; we require air brakes; we require uniform automatic couplings; and we have recently passed an act relative to the equipment and inspection of handholds, steps, ladders, and running boards; so that the locomotive boiler is practically the only part of the train which is not now subject to inspection. * * *

Mr. Robinson: * * * Its enactment will diminish the number of accidents occasioned by defective boilers and will give some greater degree of security to those engaged in the very hazardous business of operating railway locomotives. * * *

The many accidents occurring on railroads in the United States as compared with some foreign countries emphasizes the necessity of enacting this measure. It is of the highest importance that every practicable means be adopted for guaranteeing safety to operatives and to passengers. I have not the slightest doubt that the systematic inspection of boilers

on locomotives used in interstate commerce, sought to be established by this bill, will in a very short time reduce to a minimum accidents arising from defective boilers. * * *

(First five pages of report of committee on this bill. Hon. James R. Mann, Chairman, Committee on Interstate & Foreign Commerce.)

Mr. Bartlett of Georgia: Mr. Speaker, may I state that there are many inaccuracies and awkward expressions in the bill. * * * But we realize that this was important legislation—a step in the right direction—for the protection not only of the lives and limbs of the employees of the railroad, but of the property of the railroad and the property of the public, * * *.

Mr. Peters: * * * No form of accident in modern history is more terrible or more unnecessary than the boiler explosion. The demand for adequate inspection of boilers by the Government has resulted in this bill. * * * This bill assures the maintenance of a higher standard of safety in locomotive boilers and appurtenances than has heretofore been required. The requirements are absolute and unavoidable. * * * The bill also provides for the investigation and special report of all accidents due to faulty boilers. * * *"

As originally introduced the bill read in part as follows:

"SEC. 2. That from and after the first day of January, nineteen hundred and eleven, it shall be unlawful for any common carrier, * * * to use any locomotive engine * * * unless the boiler of said locomotive and appurtenances thereof are in proper condition and safe to operate in the service to which the same is put, * * * without unnecessary peril to life or limb.

Sec. 5 provided that rules should be filed with the chief inspector within three months after the approval of the

Act. Sec. 8 provided for the report and investigation of accidents resulting in serious injury or death. Sec. 2 was amended to read from and after July 1, 1911, without altering Sec. 5. In the Senate discussion of the bill, found at Congressional Record, Vol. 46, Part 1, pp. 728-731, Senator Heyburn of Idaho anticipated that this amendment would postpone the effective date of Sec. 2 until after the rules were required to be filed and the remainder of the Act as to inspection operative. Senator Cummins of Iowa, in charge of the bill, replied that the bill consisted of two parts: Section 2 creating a general obligation making it unlawful to use a boiler unless it be in safe condition, and the railroads were given until July 1st to prepare their equipment. A system of inspection as to which rules were then very largely in form and were to be filed within 3 months after approval of the Act.

Based upon the very hypothetical statement of Senator Cummins that Section 2 would be entirely operative if no part of the bill which follows Section 2 were enacted, petitioner argues that Section 8 cannot limit or restrict the benefits conferred on employees by Section 2. The Missouri Supreme Court did not so hold. But it did note Section 8 in arriving at its conclusion as to the purpose of the enactment. Certainly it is proper to consider the entire Act in the interpretation of one of the provisions thereof. *United States* v. *American Trucking Association*, 310 U. S. 534, 543-544, 60 S. Ct. 1059, 84 L. Ed. 1345; *Johnson* v. *Southern Pacific R. Co.*, 196 U. S. 1, 25 S. Ct. 158, 49 L. Ed. 363.

This would be true even though Section 2 and the remainder of the Boiler Inspection Act could be considered as separate contemporaneous enactments. *Southland Gasoline Company* v. *Bayley*, 319 U. S. 44, 47, 63 S. Ct. 917, 87 L. Ed. 1244.

But Section 2 cannot be isolated from the remainder of the Act and particularly from Section 8, which provides that in case of "accident" from any cause "resulting in injury or death" a statement must be made of the fact of such "accident."

Petitioner relies upon *In re Claim of A. E. Clark*, 27 Op. At. Gen. 346 (May 17, 1909), which involved the claim of a plate printer, suffering a sprained wrist, for leave with pay under Act of May 30, 1908 (Chap. 236, 35 Stat. 556), applicable under Section 1 to certain employees of the United States "injured in the course of such employment." Attorney General Wickersham held that not all "injuries" under the statute need be reported under Sections 3 and 4 as "accidents." But any possible application which this opinion might have is wholly nullified by the later opinion of *In re Claim of John Sheeran*, 28 Op. At. Gen. 254 (April 25, 1910). Sheeran, in the course of his employment, while removing ashes from a building furnace room, contracted a severe cold resulting in pneumonia. This was in no way due to negligence or misconduct on his part. In holding the case was not covered by the Act of May 30, 1908, Attorney General Wickersham stated:

> "There is nothing in the language of the act or its legislative history which justified the view that the statute was intended to cover disease contracted in the course of employment, although directly attributable to the conditions thereof. On the contrary it appears that the statute was intended to apply to injuries of an accidental nature resulting from employment in hazardous occupations—not to the effects of disease. . . .
>
> That opinion (27 Op. 346), however, was not intended to create the impression that the statute in question covered diseases contracted in the course of

employment. The language of the opinion is, perhaps, broader than it should be, in the light of the committee report on the bill above quoted, which indicates that only injuries of an accidental nature were in mind. As, however, the statute is remedial, it should be generously construed, and so construed it might well be held to include injuries of the character there referred to, although, strictly speaking, no definite accident had occurred which give rise to the injury. The word 'injury,' however, as used in the statute, is in no sense suggestive of disease, nor has it ordinarily any such signification."

This sound opinion strikes at the very heart of petitioner's case, for under it both a "person suffering injury" under the Federal Employers' Liability Act (45 U. S. C., Sec. 51), and a person injured by "accident" under the Boiler Inspection Act (45 U. S. C., Sec. 23, *et seq.*), could not include a person suffering "disease" as a result of and in the course of his employment. It likewise nullifies the opinion of *In re Claim of Willard E. Jewell*, July 28, 1913, Opinions of Solicitor, Dept. of Labor, Apr. 1915, p. 261, cited by petitioner.

The title of the Boiler Inspection Act is indicative of the purpose and intent of the Act (Chap. 103, 36 Stat. 913):

> "CHAP. 103—An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto."

The title was retained in the Act of March 4, 1915 (Chap. 169, 38 Stat. 1192), amending the Act to "include the entire locomotive and tender and all parts and appurtenances thereof," and in the Act of June 7, 1924 (Chap. 355,

43 Stat. 659-660), rewriting Section 2 to conform to the amendment. The Senate discussion of the Act of March 4, 1915, is found at Congressional Record, Vol. 52, Part 5; p. 5355, where Senator Robinson submitted Report No. 1068 on the bill (H.R. 17894) and stated:

> "Mr. Robinson: Mr. President, I can explain briefly the purpose of this bill. It proposes an amendment to the boiler-inspection law, which contemplates the inspection of the entire locomotive. I believe experience has shown the wisdom of the boiler-inspection law and that it is necessary, or at least advisable, that this bill should be passed."

The Missouri Supreme Court properly considered the title and legislative history of the Boiler Inspection Act to reach its conclusion that it was "aimed at promoting safety from accidental injury, as distinguished from injury due to the gradual inhalation of harmful dusts." *Harrison* v. *Northern Trust Company*, 317 U. S. 476, 479, 63 S. Ct. 361, 87 L. Ed. 407; *United States* v. *United Mine Workers of America*, 330 U. S. 258, 277-278, 67 S. Ct. 677, 91 L. Ed. 884.

B.

Section 2 of the Boiler Inspection Act is directed to the prevention of peril to life or limb and not to the prevention of sickness or disease.

Napier v. *Atlantic Coast Line R. Co.*, 272 U. S. 605, 47 S. Ct. 207, 71 L. Ed. 432, reversed 188 Wis. 232, 205 N. W. 932, holding invalid an order of the Railroad Commission of Wisconsin requiring automatic firebox doors and cab curtains. The Supreme Court of Wisconsin in a unanimous opinion, sustained the order as a health measure and not in conflict with the Boiler Inspection Act, a safety statute (l. c. 934):

> "But there is nothing in this act which even remotely suggests that the object and purpose of the federal legislation was to promote public health, or the health and comfort of employees, except in so far as that might incidentally result from the promotion of their safety."

This Court recognized the correctness of this statement but reversed on the ground that the Boiler Inspection Act, though a safety statute, was intended to occupy the entire field as to inspection and equipment of locomotives. The opinion of Brandeis, Jr., reads in part:

> "The argument mainly urged by the states, in support of the claim that Congress has not occupied the entire field, is that the federal and the state laws are aimed at distinct and different evils; that the federal regulation endeavors solely to prevent accidental injury in the operation of trains, whereas the state regulation endeavors to prevent sickness and disease due to excessive and unnecessary exposure; and that whether Congress has entered a field must be determined by the object sought through the legislation, rather than the physical elements affected by it. * * * We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the Commission leads to that conclusion. Because the standard set by the Commission must prevail, requirements by the states are precluded, however commendable or however different their purpose."

In *Chicago & N. W. R. Co.* v. *Michigan P. U. Co.*, 233 Mich. 678, 208 N. W. 62, a divided Court affirmed a decision of the public utilities commission, under a state statue, to prescribe cab curtains for railroad locomotives used in interstate commerce, on the theory that state reg-

ulation prescribing the cab curtains was for the protection of the "health" of the employees, which term was not synonymous with the "safety" of employees as used in the Federal Boiler Inspection Act. The opinion of Sharpe, J., was in complete accord with the Wisconsin Supreme Court in the Napier case, *supra*, holding as to the Federal Boiler Inspection Act (1. c. 69):

> "I can see no intimation in it of an intent to protect the health of men employed in operating the locomotive. * * * While some of the provisions of the federal acts may tend to protect the health of the employees, such protection is but incidental to the main purpose, that of safeguarding the lives and limbs of the employees and protecting that which is being transported, be it passengers or freight."

The opinion of Steere, J., followed the line of reasoning of this Court in the Napier case, and the case was reversed and remanded per stipulation of counsel by memorandum opinion (273 U. S. 779, 47 S. Ct. 448, 71 L. Ed. 888).

It was noted in the Napier case that the Interstate Commerce Commission had not exercised its power to prescribe an automatic fire-box door and cab curtain. The power was exercised in *R. R. Comm. of Wis.* v. *Aberdeen & Rockfish R. Co.*, 142 I. C. C. 199, 203, ordering Rule 116 (g), May 7, 1928, as to cab curtains; and in *Pub. Utilities Comm. of Ohio* v. *Penn. R. Co.*, 151 I. C. C. 448, 467, as to mechanically operated fire-door. The findings in these cases indicate that while appliances may be required which incidentally prevent fatigue or promote comfort their basic purpose must be to insure "safety" and prevent "unnecessary peril to life or limb." If the appliance does not meet this test then it cannot be required by the Interstate Commerce Commission no matter

how much it might benefit the health of employees. Cab curtains protect the engineer and firemen from the discomfort and distraction of rain, snow and wind, thus promoting safety. Automatic fire-doors protect the fireman from excessive fatigue and thus promotes safety.

U. S. v. *Baltimore & Ohio R. Co.*, 293 U. S. 454, 55 S. Ct. 268, 79 L. Ed. 587, was an appeal from a decree setting aside an order of the Interstate Commerce Commission under the Boiler Inspection Act, entered January 5, 1933, requiring certain steam locomotives to be equipped with a power reverse gear (*Johnson* v. *Atlantic Coast Line R. Co.*, 190 I. C. C. 354). The lower court upheld the railroad's contention that the order was void for lack of certain essential findings of fact, and this Court affirmed (l. c. 270-272):

> "The substitution of power operated reverse gear for manually operated reverse gear might conceivably found necessary to promote safety, even if it did so only incidentally by preventing the impairment of the health of engineers through excessive exertion or fatigue * * *. The operation of an engine, however equipped, involves some 'danger to life or limb.' At common law the carriers were 'free to determine how their boilers should be kept in proper condition for use without unnecessary danger.' *Baltimore & Ohio R. Co.* v. *Groeger*, 266 U. S. 521, 529, 45 S. Ct. 169, 172. And the act conferred authority to prescribe by rule, specific devises, or changes in the equipment, only where these are required to remove 'unnecessary peril to life or limb.' The power to make the determination whether the proposed devise or change is so required, vests in the Commission. But its finding to that effect is essential to the existence of authority to promulgate the rule; and, as Congress has made affirmative orders of the Commission subject to judicial review, Chicago Junction

Case, 264 U. S. 258, 263-265, 44 S. Ct. 317, the order may be set aside unless it appears that the basic finding was made. *Florida* v. *United States*, 282 U. S. 194, 51 S. Ct. 119, 125."

The Interstate Commerce Commission then held another hearing and again entered the order. *Johnson* v. *Atlantic Coast Line R. Co.*, 222 I. C. C. 542. However, this time the Commission was diligent in making the required finding (l. c. 553, 565, 568):

"In the consideration of other cases in which the safety of train and locomotive operation was involved, it is clearly indicated that the lessening of fatigue with resulting interest and efficiency in the performance of duty promotes safety and prevents unnecessary peril to life or limb. * * * Our failure to establish a rule to provide for the removal of appliances which we find cause unnecessary peril to life or limb, and to substitute therefor appliances, which we find promote the safety of employees and travelers by rail would be an evasion of one of the important duties placed by statute upon us. * * * We find that the use on steam locomotives of manually operated reverse gear, as compared with power reverse gear, causes unnecessary peril to life or limb, and that the safety of employees and travelers on railroads requires that suitable power operated reverse gear shall be substituted for manually operated reverse gear."

Johnson v. *A. T. & S. F. Ry. Co.*, 225 I. C. C. 519, 551, as to mechanical stokers, is to the same effect as to the basic finding.

The decisions are reviewed in Annotation—Construction and Application of Federal Boiler Inspection Act, 80 L. Ed. 743, II Purpose and Scope of Act, pp. 744-752; and Vol. 2, Roberts, Federal Liabilities of Carriers (2nd Ed.), Sec. 501, pp. 1023-1026.

Petitioner cites language in the Napier case that: "The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the act delegating the power." This court was there dealing with the question of whether or not the Boiler Inspection Act so occupied the field as to exclude state legislation. Since the Napier case the Commission has exercised its authority and the decisions of this Court limiting that authority to equipment necessary to promote "safety" and to remove "unnecessary peril to life and limb conclusively demonstrate that the purpose of the act was to protect employees from accidental injury in the operation of trains. The Missouri Supreme Court properly considered the rules promulgated by the Interstate Commerce Commission in the exercise of its authority as reflecting the purpose of the Act. This is the antithesis of the attempt made in the Napier case to infer a construction of the Act from the failure to exercise authority granted thereunder.

C.

There is a definite differentiation between "accidental injury" and pneumoconiosis (incuding silicosis) attributable to the inhalation of harmful dusts over a period of time.

The Missouri Supreme Court held (R. 26-27):

> "There seems to be no expression reasonably indicatory of a purpose to require the engine and its appurtenances to be so constructed and maintained as to protect against injuries due to the presence of dusts in the cabs of locomotives. There is a definite differentiation generally in the adjudicated cases, between 'accidental injury' (accidental in the sense that the injury is attended by force or violence), and pneumoconiosis (including silicosis), which is evidenced by pathological changes in lung

structure attributable to the effects of the inhalation of harmful dusts over a period of time. Vol. 1, Words and Phrases, Accident, p. 250, particularly at page 289 *et seq.*; *Smith* v. *Harbison-Walker Refractories Co.*, 340 Mo. 389, 100 S. W. (2d) 909; *Bolosino* v. *Laclede-Christy Clay Products Co.* (Mo. App.), 124 S. W. (2d) 581; *Wurst* v. *American Car & Foundry Co.* (Mo. App.), 103 S. W. (2d) 6; *Billo* v. *Allegheny Steel Co.*, 328 Pa. 97, 195 Atl. 110. See also, Morris-Landis, Diseases of the Chest (6th Ed.), p. 568; *Mansfield* v. *Wagner Electric Mfg. Co.*, 294 Mo. 235, 242 S. W. 400."

The cases are legion to support this proposition. They cannot be here reviewed. However as indicating the fundamentals of this "differentiation" we cite:

Brodek v. *Indemnity Ins. Co. of N. Am.*, 292 Ill. App. 363, 11 N. E. (2d) 228, l. c. 236:

"Other cases in this state have consistently held that an occupational disease is not an accidental injury. In *Labanoski* v. *Hoyt Metal Co.*, 292 Ill. 218, 126 N. E. 548, 549 * * * the court said the words 'accidental injury or death' are used and are to be understood in their popular sense; that an occupational disease, such as lead poisoning, does not occur suddenly, but is a matter of slow development, and the Occupational Diseases Act was passed for the protection of employees from such diseases."

McIntyre v. *E. J. Lavino & Company, et al.*, 344 Pa. 163, 25 A. (2d) 163, states:

"Occupational diseases are, from a legal standpoint, peculiar in this—that they arise, not from an accident or event happening at a precise moment, but from a day to day exposure to unhealthful conditions over an extended period; the exact time of

their origin is necessarily obscure and their insidious progress is not revealed until, frequently after a long interval, the disability which they create manifests itself. In the case of accidents compensable under the Workmen's Compensation Act, 77 P. S. No. 1 *et seq.*, the accident and the damage resulting therefrom, the cause and the effect, are usually determinable immediately and they are practically simultaneous."

D.

Since silicosis is not a consequence the Boiler Inspection Act was designed to guard against, the petitioner cannot base a recovery on any violation of that Act.

The Missouri Supreme Court held (R. 25-26):

"If none of the consequences which a statutory enactment was designed to guard against his resulted from its breach, such a breach does not constitute an actionable wrong, even though some other injurious consequence has resulted. 38 Am. Jur., Negligence, Sec. 163, p. 834; Vol. II, Restatement of the Law of Torts, Sec. 286, p. 752, *et seq.*; 45 C. J., Negligence, Sec. 111, pp. 726-7."

The court correctly treated this statement as settled law in all jurisdictions, both state and federal. 38 Am. Jur., Negligence, Sec. 163, p. 834, states the rule in accurate language:

"An action for negligence based upon an alleged violation of a statute or ordinance cannot be maintained where it appears that the statute or ordinance was enacted or ordained for a purpose wholly different from that of preventing the injury of which complaint is made. To afford a right of action for injury from the violation of a statute or ordinance, the complainant's injury must have been such as the statute or ordinance was intended to prevent. If none

> of the consequences which the enactment was designed to guard against have resulted from its breach, such a breach does not constitute an actionable wrong, even though some other injurious consequence has resulted. It is not enough for a plaintiff to show that the defendant negligected a duty imposed by statute and that he would not have been injured if the duty had been performed. He must go further and show that his injury was caused by his exposure to a hazard from which it was the purpose of the statute to protect him."

Huckleberry v. *Missouri Pacific Railroad Company*, 324 Mo. 1025, 26 S. W. (2d) 980, was an action for the death of a minor child caused by the failure to observe an Interstate Commerce Commission regulation issued under 18 U. S. C., Sec. 383, *et seq.*, requiring the inflammable liquids (gasoline) spilled from tank cars should be covered with dry earth before an engine is used in the vicinity. Gasoline from derailed tank cars was ignited while deceased's companion, on invitation, was attempting to salvage some of the gasoline. The court reversed a judgment of nonsuit, but quoted with approval from 20 R. C. L., Sec. 33, pp. 38-40:

> "The principle comprehensively stated is that where a statute or municipal ordinance imposes upon any person a specific duty for the protection or benefit of others, if he neglects to perform that duty he is liable to those for whose protection or benefit it was imposed for any *injuries of the character which the statute or ordinance was designed to prevent*, and which were proximately produced by such neglect." (Emphasis ours.)

Mansfield v. *Wagner Electric Manufacturing Co.*, 294 Mo. 235, 242 S. W. 400, was an action for an eye injury

caused by particles from an emery wheel, based upon Laws, 1919, p. 443 (Mo. R. S. A., Sec. 10194), requiring every person using a wheel which generates dust to provide such wheel with a hood and blower to carry off the dust and prevent inhalation. The court affirmed judgment for appellant upon a directed verdict, citing the similar case of *Wing* v. *Smith*, 190 Ill. App. 275; reviewed *St. L. & S. F. R. Co.* v. *Conarty*, 238 U. S. 243, 35 S. Ct. 785, 59 L. Ed. 1290, and held that the purpose and design of the statute was to promote the health of employees and not to prevent injury from dust flying into the eyes of employees, so that a verdict for defendant-appellant was properly directed. The court regarded the Conarty case, as followed in *Lang* v. *New York Central R. Co.*, 255 U. S. 445, 41 S. Ct. 381, 65 L. Ed. 729, as the latest word of this Court, rather than *L. & N. R. Co.* v. *Layton*, 243 U. S. 617, 37 S. Ct. 456, 61 L. Ed. 931.

Illinois State Trust Company v. *Missouri Pacific R. Co.*, 319 Mo. 608, 5 S. W. (2d) 368, reversed a judgment for plaintiff-respondent under the Federal Safety Appliance Act where deceased was not engaged in a coupling movement but was engaged in inserting a lug on a defective coupler of a car at rest, when struck by other cars put in motion by an unknown cause, holding that the violation of the Safety Appliance Act was not the proximate cause of his death. The court rationalized the Conarty, Lang and Layton automatic coupler cases, as well as *Davis* v. *Wolfe*, 263 U. S. 239, 44 S. Ct. 64, 68 L. Ed. 284, on the doctrine of proximate cause.

Petitioner cites the Wolfe case, the Layton case, and *Swinson* v. *C., St. P., M. & O. Ry. Co.*, 294 U. S. 529, 55 S. Ct. 517, 79 L. Ed. 1041, for the proposition that recovery can be grounded on a violation of the Safety Appliance Act (as to automatic couplers and grab irons) even though

employee was not engaged in an operation in which the safety appliances were specifically designed to furnish him protection so long as the violation of the Act was the proximate cause of the accident.

In the Wolfe case the employee conductor was standing on a car sill step and holding to the grab iron while the train moved slowly at a station. He signalled the fireman for a stop but the train moved forward with a violent jerk and the loose grab iron caused Wolfe to fall. It was urged that Section 4 of the Safety Appliance Act required grab irons to aid in coupling movements and not for aid to the transportation of employees, but this Court stated that it was not unusual for employees to hold the grab iron to signal orders as to train movements and held that the violation of the Act was the proximate cause.

In the Layton case an attempted coupling failed and the cars collided with a car on which respondent switchman was standing, throwing him to the track. This Court held that the automatic coupler provision of the Safety Appliance Act was not confined to the protection of employees only when actually engaged in making a coupling, and the violation was the proximate cause.

In the Swinson case a handhold or grab iron gave way when a brakeman had a foot on it while attempting to release a tightly set hand brake. The use was not unusual and a natural one, subjecting the handhold to no appreciable greater strain.

Clearly these cases on proximate cause are not in point. The purpose of the grab irons is to hold to, and the purpose of couplers is to hold cars together. If defective, an action may be maintained for accidental injuries proximately caused by the defect. But the purpose of sanders is to give more breaking power to stop the locomotive and train. The purpose of the rule as to unnecessary or

excessive openings and cab curtains is to protect the engineer and fireman from inclement weather and thus reduce the hazard of collision. If a collision resulted from a violation of either of these rules resulting in accidental injury then a recovery could be based on the violation.

Fairport, P. & E. R. Co., v. *Meredith*, 292 U. S. 589, 54 S. Ct. 826, 78 L. Ed. 1446, holds that injuries sustained by an automobile occupant in a crossing collision as the result of defective power brakes is within the terms and intent of the Safety Appliance Act, thus recognizing the rule that recovery can be had only for an injury the statute was designed to prevent. The purpose of power brakes, like sanders, is to prevent collision.

II.

The Boiler Inspection Act furnishes no intelligible standard of conduct as to the prevention of occupational disease or the inhalation of harmful dusts.

The Boiler Inspection Act cannot be construed as requiring protecton from the gradual inhalation of harmful dusts or occupational disease. So construed, the Act would be invalid since it furnishes no intelligible standard of conduct for compliance. *Connally* v. *General Construction Co.*, 269 U. S. 385, 389, 391, 46 S. Ct. 126, 70 L. Ed. 322; *Vallat* v. *Radium Dial Co.*, 360 Ill. 407, 196 N. E. 485, 99 A. L. R. 607, and NOTE 613. State statutes have consistently fallen by the wayside when they attempted to furnish protection against occupational disease, without furnishing some intelligible standard of conduct for compliance by the employer.

Respondent realizes that this Court in *Baltimore & O. R. Co.* v. *Groeger*, 266 U. S. 521, 45 S. Ct. 169, 69 L. Ed.

419, held that the Act prescribes a sufficiently definite and certain standard of duty in that it replaces the common law duty with an absolute duty to have the locomotive boiler in a safe condition to operate without unnecessary peril. But the Court recognized that it should be left to the railroad to determine whether or not new devices and appliances were to be used.

Devices and appliances of an experimental nature, not customarily used, are not within the absolute duty imposed by the Act. *Southern Ry. Co.* v. *Lunsford*, 297 U. S. 398, 402, 56 S. Ct. 504, 80 L. Ed. 740, states:

> "Whatever in fact is an integral or essential part of a completed locomotive, and all parts or attachments definitely prescribed by lawful order of the Interstate Commerce Commission, are within the statute. But mere experimental devices which do not increase the peril, but may prove helpful in an emergency, are not. These have not been excluded from the usual rules relative to liability."

Devices and appliances for the protection of employees against harmful dusts or occupational disease are not, by custom, usage or rule, a part of a complete locomotive, and the Act furnishes no guide as to what devices are acceptable and what protection shall be given.

III.

Proof of negligence is essential to a recovery under the Federal Employers' Liability Act for injuries resulting in negligence in cars, engines and appliances and the Boiler Inspection Act cannot be invoked to dispense with proof of negligence unless the injury was one that the Act was designed to prevent.

Section 1 of the Federal Employers' Liability Act of 1908 (45 U. S. C., Sec. 51), gave a right of action to employees "'suffering injury' resulting in whole or in part

from carrier's "negligence, in its cars, engines, appliances" or other equipment. Section 4 withdraws the defense of assumption of risk where the "violation * * * of any statute enacted for the safety of employees contributed to the injury or death * * *," and the Amendment of 1939 further withdrew such defense where the injury or death resulted from negligence, but the Amendment was not retroactive. Section 3 withdrew the defense of contributory negligence where the "violation * * * of any statute enacted for the safety of employees contributed to the injury or death * * *," but where the injury or death resulted from negligence, "* * * the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: * * *."

When the Boiler Inspection Act was enacted in 1911, Section 2 was considered a "statute enacted for the safety of employees" within Sections 3 and 4 of the Federal Employers' Liability Act, abolishing the defenses of contributory negligence and assumption of risk as to actions based on a violation of such statutes.

Accordingly, petitioner brought his action under the Federal Employers' Liability Act but alleged as negligence *per se* the violation of an absolute duty imposed by the Boiler Inspection Act, thereby foreclosing respondent of the defense of assumption of risk as to acts or defects prior to August 11, 1939, and of diminution of damages for contributory negligence as to all acts and defects. In addition, petitioner, under this allegation, did not have to prove the elements of common law negligence, but was only required to prove a violation of the Act.

But the Boiler Inspection Act no more amended the Federal Employers' Liability Act than that Act had amended the prior Safety Appliance Acts. *A., T. & S. F. Ry. Co.* v. *Swearingen*, 239 U. S. 339, 36 S. Ct. 121, 60 L. Ed. 317. While neither the Boiler Inspection Act nor

the Safety Appliance Acts contain express language conferring a right of action for the death or injury of an employee, the right of action, even without the Federal Employers' Liability Act, has never been doubted. *Texas & P. Ry. Co.* v. *Rigsby*, 241 U. S. 33, 36 S. Ct. 482, 60 L. Ed. 874; *Louisville & N. R. Co.* v *Layton*, 243 U. S. 617, 620, 37 S. Ct. 456, 61 L. Ed. 931.

Negligence under the Federal Employers' Liability Act remains common law negligence and this is true as to "negligence, in its cars, engines, appliances" or other equipment. *Seaboard Air Line R. Co.* v. *Horton*, 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062.

Hence, even though the two acts are said to be *in pari materia*, where a recovery is sought, based upon a violation of the Boiler Inspection Act, the injury suffered must be one within the purview of the Boiler Inspection Act and one it was designed to prevent. To hold otherwise and allow a recovery by any person "suffering injury" as that term is used in the Federal Employers' Liability Act would be to enlarge, by judicial construction, the class of injuries as to which Congress has withdrawn the defenses of contributory negligence and assumption of risk. No decision of this Court even intimates that could be done.

IV.

Negligence is essential to any recovery at common law for occupational disease and to any recovery under the Federal Employers' Liability Act, and the unbending test of negligence as to methods, machinery and appliances is the ordinary usage of the business. Respondent cannot be held to have anticipated the novel possibility of petitioner contracting silicosis while working in the open cab of a moving engine.

The better reasoned authority is to the effect that there is no common law right of recovery for a true occupational

disease such as silicosis. (Annotation—Liability at common law * * * for occupational disease contracted by employee, 105 A. L. R. 80.)

But even in those jurisdictions recognizing a common law right of recovery there must be proof of all the elements of negligence. *Wolf* v. *Mallinckrodt Chemical Works*, 336 Mo. 746, 81 S. W. (2d) 323, 327; *Jones* v. *Rinehart & Dennis Co., Inc.*, 113 W. Va. 414, 168 S. E. 482, 484;

The Federal Employers' Liability Act, standing alone, created no right of action that did not exist at common law. *Escandon* v. *Pan American Foreign Corporation* (C. C. A. 5), 88 F. (2d) 276. The elements of common law negligence govern except as Congress has written into the law different standards. *Seaboard Air Line R. Co.* v. *Horton*, 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062; *C. & O. R. Co.* v. *Kuhn*, 284 U. S. 44, 52 S. Ct. 45, 76 L. Ed. 157; *Yazoo & M. Valley R. Co.* v. *Mullins*, 249 U. S. 531, 39 S. Ct. 368, 63 L. Ed. 754; *Brady* v. *Southern R. Co*, 320 U. S. 476, 484, 64 S. Ct. 232, 88 L. Ed. 239;

This is a novel case. The opinion sought to be reviewed and the petitions on which the cause was based state no facts indicating that respondent knew or should have known that dust from the sand used in the sanders and being sucked up into the cabs of locomotives would cause silicosis. There is nothing to indicate that good custom and usage in the railroad business required precautions be taken against such a possibility. The Rules of the Interstate Commerce Commission contain no provisions for appliances or precautions to be taken to protect against silicosis.

The Court will take judicial notice of the general construction of locomotives, of the fact that it is not customary for railroads to provide enginemen with masks, respirators or other appliancees to protect against silicosis,

that all sand contains silica, and that this is a new and novel complaint so far as enginemen are concerned. *Chicago, M. & St. P. R. Co.* v. *Wisconsin*, 238 U. S. 491, 400, 35 S. Ct. 869, 59 L. Ed. 1423; *March* v. *Pitcairn* (Mo. App.), 125 S. W. (2d) 972.

There appears to be only one other reported case where recovery was sought for silicosis in an action under the Federal Employers' Liability Act: *Sadowski* v. *Long Island R. Co.*, 292 N. Y. 448, where an engine service man was required to work in an enclosed sand house while enveloped in a cloud of silica dust, his duties including the handling of sand destined for locomotive sand boxes. The court sustained a recovery, holding that it is common knowledge that it is injurious to the lungs to work in silica dust. However, working in an enclosed building in a cloud of silica dust is far different from working in the open cab of a moving engine where the only dust is that drawn up from the roadbed and sanders.

It is entirely clear that, absent proof of notice to respondent that silicosis might be contracted from such dust as entered the engine cabs, there could be no recovery. *Grammer* v. *Mid-Continent Petroleum Corp.* (C. C. A. 10), 71 F. (2d) 38, 40, cer. den. 293 U. S. 571; *Canfield* v. *Iowa Dairy Separator Co.* (Iowa), 154 N. W. 434.

The situation is analogous to the early cases of creosote poisoning. It was first held that no recovery could be had because the employer could not be charged with knowledge of the harmful effects of handling creosoted ties. *Pinkley* v. *C. & E. I. Ry. Co.*, 246 Ill. 370, 92 N. E. 896; *Pecos & N. T. Ry. Co.* v. *Collins* (Tex. Civ. App.), 173 S. W. 250, 256. However, as the harmful effects of creosote to internal body tissues became known the knowledge of the employer became a question for the jury. *Sweany* v. *Wabash Ry. Co.* (Mo. App.), 80 S. W. (2d) 216, 221.

Wommack v. *Orr*, 352 Mo. 113, 176 S. W. (2d) 477, is of particular significance. The petition charged common law negligence only in failing to provide a reasonably safe place to work and failure to warn. Wommack was employed by Orr most of the time from 1932 to July, 1940, in the hauling of lead and zinc ores in the Joplin mining district. Part of the time he worked in the cars into which the ore was unloaded from the trucks and he testified that the dust was extremely heavy in these cars. The court held that a demurrer to the evidence was properly sustained because there was no substantial evidence that those engaged in a business like or similar to that of defendant had established a standard of care to protect their employees from exposure to silicosis, and that defendant had failed to adopt such standard. The court said (l. c. 482):

> "From the record the inference is that defendant carried on the business of ore hauling in about the same manner as did all others in the mining districts concerned. * * * 'No one is held by the law to a higher degree of care than the average in the trade or business in which he is engaged. * * * A man, in conducting his business in the way that everybody else in a like business does, has measured up to the ordinary care of prudent men men engaged in the business.' *McClaren* v. *G. S. Robins & Co.*, 349 Mo. 653, 162 S. W. (2d) 856, l. c. 858, and cases there cited. See also, *Uric* v. *Thompson et al.*, Mo. Sup., 176 S. W. (2d) 471, handed down currently herewith."

This Court has announced a similar rule. *Southern P. Co.* v. *Seley*, 152 U. S. 145, 14 S. Ct. 530, 38 L. Ed. 391. The railroad is not required to furnish the latest, best and safest appliances. *Baltimore & O. R. Co.* v. *Groeger*, 266 U. S. 521, 45 S. Ct. 169, 69 L. Ed. 419.

The Missouri Supreme Court, on first appeal (*Urie* v. *Thompson*, 352 Mo. 211, 176 S. W. (2d) 471), correctly ruled that (l. c. 475):

> "We do not think that it would be reasonable to hold, under the facts admitted by the demurrer, that defendant should have anticipated plaintiff's injury, and we, therefore, rule that the petition does not state facts sufficient to constitute a cause of action for negligence under the Federal Employers' Liability Act."

V.

The words "any person suffering injury" in the Federal Employers' Liability Act does not include occupational disease or, more specifically, injury due to the gradual inhalation of harmful dusts.

The Act does not define the phrase "any person suffering injury." However, there is nothing in the language of the Act or its legislative history (Congressional Record, Vol. 42, pp. 4265, 4426-4438, 4526-4551, 4755) which justifies the view that the statute was intended to cover occupational disease. The words "any person suffering injury," as they are used in the Act, are in no sense suggestive of disease. As stated by Attorney General Wickersham in *In re Claim of John Sheeran*, 28 Op. At. Gen. 254, the word "injury" is in no sense suggestive of disease "nor has it ordinarily any such signification."

Most of the numerous decisious holding that the word "injury" either did, or did not, include occupational disease, arose under Workmen Compensation Acts or Occupational Disease Acts. Many of the early compensation acts were modeled after the British act which granted compensation only where there was a "personal injury by accident." It was uniformly held that where these words were used or where the Act plainly indicated that

it was to apply only to accidental injuries, compensation could not be recovered by an employee suffering an occupational disease. This resulted in most of the acts being amended to specifically include occupational disease or in the enactment of occupational disease acts.

For example petitioner cites *Marsh* v. *Industrial Commission of California*, 217 Cal. 338, 18 P. (2d) 933, 936, for the statement that silicosis and pneumoconosis are uniformly held to be injuries. That case was a proceeding under the California "Workmen's Compensation, Insurance and Safety Act of 1917" (Acts 1917, p. 831, 833), Sec. 3 (4) of which provided: "The term 'injury,' as used in this act, shall include any injury or disease arising out of the employment." *Wurst* v. *American Car & Foundry Co.* (Mo. App.), 103 S. W. (2d) 6, 16, cited by petitioner, involved the Missouri Occupational Disease Act of 1913 (Laws 1913, p. 402, Mo. R. S. A., Secs. 10211-10225).

However the early compensation acts of Connecticut, Ohio, Michigan and Massachusetts covered "injury" sustained in the course of employment without qualification. Public Acts of the State of Connecticut, January Session, 1913, Ch. 138, p. 106, consists of two parts: Part A—Employers' Liability, and Part B—Workmens' Compensation. Each part covered "* * * personal injury sustained by an employee arising out of and in the course of his employment * * *." The Connecticut Supreme Court in *Miller* v. *American Steel & Wire Co.*, 90 Conn. 349, 97 Atl. 345, held that an occupational disease was not within the terms of the act, following *Industrial Accident Commission* v. *Brown*, 92 Ohio 309, 110 N. E. 744, and *Adams* v. *Acme White Lead & Color Works*, 182 Mich. 157, 148 N. W. 485, both decided on similar statutes. The only contrary case was Hurle's case, 217 Mass. 223, 104 N. E. 336, where the court thought it significant that the legislature

did not follow the wording of the English act, "personal injury by accident." That argument could not apply here because the Federal Employers' Liability Act is not a compensation act.

Petitioner cites several cases where recovery was allowed under the Federal Employers' Liability Act and the injury was not "attended by force or violence." *Kansas City Southern Ry. Co.* v. *Chandler* (Tex. Civ. App.), 192 S. W. (2d) 304, which affirmed judgment for plaintiff switchman by in an action for injury to his feet caused by alighting on a path covered with irregular rock (l. c. 310).

> "* * * we can see no valid reason for denying appellee the right of recovery simply because the injury suffered by him was the result of repeated traumas instead of one injury."

An occupational disease is an entirely different matter.

Baltimore & O. R. Co. v. *Branson*, 128 Md. 678, 98 Atl. 225, affirmed judgment for plaintiff painter who was poisoned by inhaling the spray from a paint gun he used over a period of some 11 months. The court held that the demurrer to the declaration was properly overruled, the words "suffering injury" in the Federal Employers' Liability Act being broad enough to include the injury sued for. The court entered into no examination of authority but grounded its ruling on the proposition that the Act was to be liberally construed. This Court reversed because the employee was not engaged in interstate commerce, 242 U. S. 623, 37 S. Ct. 244, 61 L. Ed. 534, and so was not called upon to deliver an authoritative opinion on the matter.

In the other cases cited by petitioner involving silicosis, and lead, creosote and carbon monoxide poisoning, recovery was permitted without any discussion whatever

as to whether the harm suffered was an "injury" under the Act.

For a comparison with other Federal acts, see Federal Employees' Compensation Act, 5 U. S. C., Sec. 790, par. 8, providing: "The term 'injury' includes, in addition to injury by accident, any disease proximately caused by the employment"; and Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C., Sec. 902(2), providing: "The term 'injury' means accidental injury or death * * * and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury * * *."

Certainly we are not to believe that Congress meant "injury" in the Federal Employers' Liability Act to include occupational disease as well as accidental injury, when it was found necessary to so carefully define the term in these other acts in order to bring occupational disease within their scope.

Nor does right and justice demand that the term "any person suffering injury" be given unlimited scope. By the original act of 1908, Congress abolished the fellow servant rule and substituted comparative negligence for the common law defense of contributory negligence. By the amendment of 1939 assumption of risk was abolished as a defense to negligence, as it had been originally withdrawn as to violation of safety statutes. It is not reasonable to believe that Congress would understand the acts to cover occupational disease and yet withdraw all defense and leave the amount of recovery to the conscience or sympathy of a jury. The employer frequently cannot guard against occupational disease and frequently is not aware that it is being contracted until the employee is incapacitated. For this reason it is generally covered only by compensation acts or special occupational disease acts.

To include occupational disease in the Federal Employers' Liability Act would be, in effect, to impose liability without a limit on the amount of recovery.

VI.

Petitioner assumed the risk of silicosis from dust in engine cabs prior to the Amendment of August 11, 1939, to the Federal Employers' Liability Act. (45 U. S. C., Sec. 54.)

Assumption of risk becomes material only if it should be held that no recovery can be based on the Boiler Inspection Act, but that action might be maintained under the Federal Employers' Liability Act. In that event there is no doubt that the defense of assumption of risk has always been available, prior to the amendment of 1939. *Great Northern Ry. Co.* v. *Leonidas*, 305 U. S. 1, 59 S. Ct. 51, 83 L. Ed. 3.

The amendment of 1939, abolishing assumption of risk, can be given no retroactive application. *Brady* v. *Southern Ry. Co.*, 222 N. C. 367, 23 S. E. (2d) 334, 340; *Game* v. *Atlantic Coast Line R. Co.*, 204 S. Car. 452, 30 S. E. (2d) 33, 34; *Christenson* v. *Union Pac. R. Co.*, 137 Neb. 538, 290 N. W. 246; *Wichita Falls & S. R. Co.* v. *Lindley* (Tex. Civ. App.), 143 S. W. (2d) 428, 431; *Tennessee Cent. Ry. Co.* v. *Shacklett*, 24 Tenn. A. 563, 147 S. W. (2d) 1054, 1057. These cases all construe the 1939 amendment, but they are based upon and follow *Winfrey* v. *Northern Pacific R. Co.*, 227 U. S. 296, 33 S. Ct. 273, 57 L. Ed. 518, which is conclusive on the proposition.

The determination as to whether or not petitioner assumed the risk of contracting silicosis must be made in the light of the facts as revealed by the opinion of the Missouri Supreme Court. There is nothing in that opinion to indicate that the danger of working in any dusts

in the engine cab was not as fully known and realized by the petitioner as it was by the respondent. It was an incident to the employment as to which respondent had no superior notice or knowledge. No complaint was made and no assurance was given that the situation would be remedied. If, as alleged, petitioner worked in the dust of engine cabs for thirty years then it was an incident of his employment and he was as fully cognizant of any danger involved as was respondent. Most of the harm must have been from dust inhaled prior to August 11, 1939, and damages since that time are not separately stated.

Under these facts he assumed the risk of silicosis and cannot recover under the Act. *Seaboard Air Line R. Co.* v. *Horton*, 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062; *Northwestern Pac. R. Co.* v. *Bobo*, 290 U. S. 499, 503, 54 S. Ct. 263, 78 L. Ed. 462; *Chesapeake & O. Ry. Co.* v. *Kuhn*, 284 U. S. 44, 46-47, 52 S. Ct. 45, 76 L. Ed. 157; *Delaware, L. & W. R. Co.* v. *Koske*, 279 U. S. 7, 10-11, 49 S. Ct. 202, 73 L. Ed. 578.

VII.

Petitioner cannot maintain an action for injuries from dust inhaled before three years prior to instituting action on November 25, 1941. (45 U. S. C., Sec. 56.)

The limitation provision of Section 6 of the Federal Employers' Liability Act (45 U. S. C., Sec. 56) is one of substantive right, setting a limit to the existence of the obligation which the Act created. *Engel* v. *Davenport*, 271 U. S. 33, 38, 46 S. Ct. 410, 70 L. Ed. 813; *Atlantic Coast Line R. Co.* v. *Burnette*, 239 U. S. 199, 201, 36 S. Ct. 75, 60 L. Ed. 226; *Flynn* v. *N. Y., N. H. & H. R. Co.*, 283 U. S. 53, 51 S. Ct. 357, 75 L. Ed. 837.

Reading Co. v. *Koons*, 271 U. S. 58, 63-64, 46 S. Ct. 405, 70 L. Ed. 835 holds that a cause of action for death "accrued" under 45 U. S. C., Sec. 56, when the injury occurred and not at the time of death or the appointment of an administrator. This is true even though there be a justified delay in the appointment of an administrator. It was held that in both actions for death and for injury, the cause "accrues" "when the events have occurred which determine that the carrier is liable." The event on which liability is based is the inhalation of harmful dust. That event occurred each time a breath of dust was inhaled and the action then accrued. Petitioner could then have instituted his action and he could certainly have shown damage, past and prospective, on November 25, 1938. If he did not then realize that he had suffered "injury" that fact is without legal significance. The limitation provision is a part of the Act creating the right and is therefore a limitation of the right, rather than the remedy. It is founded upon public policy.

Damiano v. *Pennsylvania R. Co.* (C. C. A. 3), 161 F. (2d) 534, holds that 45 U. S. C., Sec. 56, cannot be tolled by fraud or concealment which prevented the institution of an action.

The Missouri Supreme Court, on first appeal (352 Mo. 211, 176 S. W. (2d) 471), held that the cause of action accrued in May, 1940, when petitioner became incapacitated, and was not barred, citing: *Associated Indemnity Corp.* v. *State Industrial Accident Comm.*, 124 Cal. App. 378, 12 P. (2d) 1075, and *Marsh* v. *Industrial Accident Comm.*, 217 Cal. 338, 18 P. (2d) 933, both holding that, for the purpose of "compensation" injury dates from the time that a diseased condition results in the incapacity to work. *Madison* v. *Wedron Silica Co.*, 352 Ill. 60, 184 N. E.

901, which was an action under an Occupational Disease Act providing that disablement should be treated as the accidental injury and making applicable the provisions of the state compensation act. *Palzak* v. *Allegheny Steel Co.*, 324 Pa. 422, 188 Atl. 130, which was an action under an act for the prevention of harm from dusts under which the cause accrued from the "time when the injury done."

It is submitted that these decisions do not support the holding of the court that the cause accrued when petitioner became incapacitated. It is the purpose of compensation acts to grant employees compensation only when they are unable to work. The amount and duration of compensation is dependent upon the inability to work. Occupational disease acts are generally only supplemental to compensation acts and both, quite generally, provide that in case of occupational disease no action can be instituted until the employee is disabled and the right then accrues.

The court in *Sadowski* v. *Long Island R. Co.*, 292 N. Y. 448, 55 N. E. (2d) 497, fell into the same error as did the Missouri Supreme Court, when it held that because of a continuing duty the entire cause accrued only when disability occurred.

We must look to actions for common law negligence to find the correct answer as to when the cause of action accrued. In such cases the overwhelming weight of authority is that the cause of action accrues when the forces which cause the injury are put in motion and that, in the case of silicosis, a cause of action sounding in negligence accrues when, through lack of care of the employer, the harmful dust enters the lungs of the employee. Later injurious developments are merely elements of damage in the first cause of action, even though the development of consequential damages may be long delayed and even

though the employee does not know of his injury. *Schmidt v. Merchants Despatch Trans. Co.*, 270 N. Y. 287, 200 N. E. 824; *Brown v. Tennessee Con. Coal Co.*, 49 Tenn. App. 123, 83 S. W. (2d) 568, 576-577; *Barksdale v. Silica Products Co.*, 200 Ark. 32, 137 S. W. (2d) 901, 902; *Scott v. Rinehard & Dennis Co.*, 116 W. Va. 319, 180 S. E. 276; *Street v. Consumers Mining Corp.*, 185 Va. 561, 38 S. E. (2d) 271, 272-273. Only a few of the many silicosis cases have been cited.

In *Moore v. A., T. & S. F. R. Co.*, 187 Okla. 534, 104 P. (2d) 236, the plaintiff sustained injury on January 24, 1937, which did not result in appreciable disability until approximately two years thereafter. He filed suit on October 26, 1939, and the court, citing *Reading Co. v. Koons, supra*, held that the cause of action accrued when the accident occurred, and the cause was barred under 45 U. S. C., Sec. 56. In *Cox v. M., K. & T. R. Co.*, 335 Mo. 1226, 76 S. W. (2d) 411, the plaintiff, on September 1, 1925, was struck a slight blow on the left hand by a sledge hammer, but in the course of a year or so cancer developed. It was held that an action brought within two years of the time the cancer developed but not within two years from the time the blow was struck, was too late, and the action barred by 45 U. S. C., Sec. 56.

Clearly petitioner's cause of action is limited to injury from dust inhaled between November 25, 1938, and May, 1940, when his employment was terminated. Since he was employed for some thirty years, and he alleges he breathed this dust during all that time, it appears obvious that his silicosis is almost entirely due to dust inhaled prior to November 25, 1938. At some period prior to that time he must have suffered some injurious effects, whether realized or not, and it was at that time that his cause of action accrued. The action had ceased to exist by reason of the

limitation on the right creating it. No action existed when this suit was instituted on November 25, 1941.

VIII.

Since the transcript of record does not contain the judgment or opinion of the Supreme Court of Missouri on first appeal, it cannot be affirmatively determined that a decision of a federal question was necessary to a determination of the cause or that the judgment was not final, so as to permit review on certiorari from the final judgment in the second appeal.

Petitioner seeks a review of the judgment on the first appeal on the theory that he did not then have a right of review because the judgment was not final. But if the judgment on first appeal were final or did not involve a federal question, then it could not be reviewed on certiorari from judgment in the second appeal. *Rio Grande Western R. Co.* v. *Stringham*, 239 U. S. 44, 36 S. Ct. 5, 60 L. Ed. 136.

Only final judgments involving a federal question can be reviewed on certiorari to a state court (28 U. S. C., Sec. 344(b)). A state court judgment will not be reviewed until these jurisdictional facts appear from the record. *Herb* v. *Pitcairn*, 324 U. S. 117, 128, 65 S. Ct. 459, 89 L. Ed. 789; *Williams* v. *Kaiser*, 323 U. S. 471, 477, 65 S. Ct. 363, 89 L. Ed. 398.

It is the judgment and not the opinion which is reviewed and, while the opinion may now be examined to determine the basis for the judgment, the opinion properly authenticated must appear as a part of the record. *Loeb* v. *Trustees of Columbia Twp.*, 179 U. S. 472, 481, 21 S. Ct. 174, 45 L. Ed. 280; *Reinman* v. *Little Rock*, 237 U. S. 171, 179, 35 S. Ct. 511, 59 L. Ed. 900.

Petitioner has not seen fit to print as a part of the transcript of record either the judgment or opinion of

the court on first appeal. The opinion appears only by reference to the reported opinion. In this state of the record the judgment on first appeal cannot be here reviewed.

IX.

Certiorari should be denied.

Rule 38, par. 5, of this Court provides in part:

> "5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."

While this Court has not heretofore determined whether or not an action can be maintained for silicosis under the Federal Employers' Liability Act or Boiler Inspection Act, it has many times announced the principles governing recovery. There is no limit to the types and variety of damages that may be alleged in personal injury actions under those Acts. The novelty of the case is not an adequate ground for the grant of certiorari.

Congress made discretionary the grant of certiorari to ease the burden of this Court. That burden will not be eased if certiorari is granted in all actions under the Federal Employers' Liability Act where it is held that no case has been made for a jury. No preference should be given actions under that Act over litigation involving other federal statutes. *Bailey v. Central Vermont Ry. Co.*, 319 U. S. 350, 354-359, 63 S. Ct. 1062, 87 L. Ed. 1444, dissenting opinion of Mr. Justice Roberts, joined by Mr. Justice Frankfurter, and concurring opinion of Mr. Chief Justice Stone.

A jury has found that petitioner is suffering from silicosis, rather than pulmonary tuberculosis, as contended

by respondent, and that his condition was caused by reason of his employment (R. 23-24, R. 9-10, Instruction No. 1, R. 12, Instruction No. U). Respondent must accept that verdict. However, his condition only comes within the proper sphere of compensation legislation. But Congress has not seen fit to enact a compensation law for seamen and railroad employees as it has for longshoremen and harbor workers. As stated in the dissent of Mr. Justice Frankfurter, joined by Mr. Justice Jackson and Mr. Justice Burton, in *Johnson* v. *United States*, 68 S. Ct. 391, l. c. 396:

> "But so long as Congress sees fit to have liability for injuries by railroad employees and seamen based solely on proof of fault, it is not for this Court to torture and twist the law of negligence so as to make it in result a law not of liability for fault but a law of liability for injuries."

Petitioner could not make a case of common law liability for negligence under the Federal Employers' Liability Act. He therefore sought to recover for a violation of the Boiler Inspection Act which would be negligence *per se* and which would eliminate the necessity of providing the elements of common law negligence and would avoid diminution of damages for contributory negligence. But the Boiler Inspection Act was enacted to promote the "safety" of employees from "accidental injury" and was not enacted to protect employees from occupational diseases. Therefore, the Act cannot be invoked by petitioner to recover for silicosis—an occupational disease.

Wherefore respondent respectfully submits that, in the exercise of sound judicial discretion, certiorari should not be granted.

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APPENDIX.

Boiler Inspection Act.

The pertinent provisions of the Federal Boiler Inspection Act, and amendments, as originally enacted, are as follows:

(Chapter 103, 36 Statutes at Large, pp. 913-916)

"CHAP. 103—An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto.

* * * * * * *

SEC. 2. That from and after the first day of July, nineteen hundred and eleven, it shall be unlawful for any common carrier, its officers or agents, subject to this Act to use any locomotive engine propelled by steam power in moving interstate or foreign traffic unless the boiler of said locomotive and appurtenances thereof are in proper condition and safe to operate in the service to which the same is put, that the same may be employed in the active service of such carrier in moving traffic without unnecessary peril to life or limb, and all boilers shall be inspected from time to time in accordance with the provisions of this Act, and be able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.

* * * * * * *

SEC. 5. That each carrier subject to this Act shall file its rules and instructions for the inspection of locomotive boilers with the chief inspector within three months after the approval of this Act. * * *

* * * * * * *

SEC. 8. That in the case of accident resulting from failure from any cause of a locomotive boiler or its appurtenances, resulting in serious injury or death to one or more persons, a statement forthwith must be made in writing of the fact of such accident, by the carrier owning or operating said locomotive, to the chief inspector. Whereupon the facts concerning such accident shall be investigated by the chief inspector * * *

The Interstate Commerce Commission may at any time call upon the chief inspector for a report of any accident embraced in this section. * * * Neither said report nor any report of said investigation nor any part thereof shall be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investigation.

Approved, February 17, 1911."

(Chapter 169, 38 Statutes at Large, p. 1192)

"CHAP. 169—An Act to amend an Act entitled * * *

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section two of the Act entitled * * * shall apply to and include the entire locomotive and tender and all parts and appurtenances thereof.

SEC. 2. That the chief inspector * * * shall have the same powers and duties with respect to all the parts and appurtenances of the locomotive and tender that they now have with respect to the boiler of a locomotive and the appurtenances thereof, and the said Act * * * shall apply to and include the entire locomotive and tender and all their parts with the same force and effect as it now applies to locomotive boilers and their appurtenances. * * *

Approved, March 4, 1915."

(Chapter 355, 43 Statutes at Large, pp. 659-660)

CHAP. 355—An Act to amend the Act entitled . . .

SEC. 2. Section 2 of such Act is amended to read as follows:

SEC. 2. That it shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of this Act and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.

. . . . . .

Approved, June 7, 1924."